IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARIO ALIANO, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 1:14-cv-10148**
WHISTLEPIG, LLC, and GOAMERICAGO BEVERAGES, LLC	)	**Magistrate Judge Sheila M. Finnegan (consent for all purposes)**
Defendants.	)	

DEFENDANTS' RESPONSE CONCERNING PLAINTIFF'S
FAILURE TO FILE COURT-ORDERED DISCOVERY PLAN

On November 12, 2015, the Court ordered Plaintiff Mario Aliano to submit a proposed discovery plan by December 14, 2015, outlining whatever targeted discovery Plaintiff might need to support his motion for class certification. (See, Doc. 46). As discussed below, Plaintiff has failed to submit a discovery plan, and apparently intends to abandon this case after more than a year of litigation. In light of Plaintiff's failure to pursue discovery substantiating his motion for class certification, Defendants respectfully request that the Court deny that motion. In the alternative, Defendants request discovery relevant to Aliano's adequacy as a class representative, including the circumstances regarding the recently-revealed unavailability of the computer purportedly used to research his purchase of Defendants' product.

Background

I. Procedural History

On June 1, 2015, Plaintiff filed a motion to certify this case as a class action. (See, Doc. 26). Defendants filed opposition memoranda (See, Docs. 29 and 42) prior to class discovery, arguing that class certification was impossible on multiple legal grounds, including the predominance of individual issues over common ones and Aliano's inadequacy as a class representative. In response, Plaintiff argued that a decision on class certification should be deferred pending discovery on class certification issues. (See, Doc. 40 at 3). The Court ultimately concluded that some targeted discovery might be permissible, and ordered Plaintiff to file a proposed discovery plan identifying any discovery that might support class certification by December 14, 2015. (See, Doc. 46). The Court directed Defendants to file a response by January 6, 2016. (Id.). More than three weeks have passed since the December 14, 2015 deadline, and Plaintiff has not submitted a proposed discovery plan or made any other filing in this case.

II. Recent Revelations Regarding Aliano's Computer

Since the beginning of this case, Defendants have made clear that they intend to challenge Aliano's allegation (repeated verbatim in several suits filed by Aliano against *other* spirit producers) that he visited WhistlePig's website before making his purchase and was allegedly deceived by statements made on the website. (See, Docs. 29 and 42). Consistent with that intention, Defendants notified Plaintiff's counsel at their initial Rule 26(f) conference in early 2015 that Plaintiff's computer and its internet history needed to be preserved for later inspection. (See, attached Declaration of Michael D. Hayes, ¶ 2). Defendants also raised the possibility of a forensic examination of the computer during several court appearances, and expressly sought discovery related to Aliano's internet search history and a forensic inspection of the computer in Defendants' proposed first interrogatories and document requests. (See, Doc. 42 at Exhibits 1 and 2). At no time did Plaintiff indicate that there would be any difficulty in securing Aliano's computer for this purpose.

Against this backdrop, Defendants were surprised to learn from Plaintiff's counsel on December 2, 2015 that Aliano now claims to have discarded his computer, and that it is not available for any inspection. (See, Hayes Decl., ¶ 3). After receiving this news, Defendants' counsel on December 9, 2015 informed Plaintiff's counsel that Defendants intended to pursue discovery into the suspicious circumstances surrounding the disappearance of critical evidence (Id. at ¶ 4), which – amongst other issues – bears directly on Aliano's adequacy as a class representative.

III. Plaintiff Then Proposes To Dismiss The Case, But Without Prejudice

On December 14, 2015, Plaintiff's counsel sent Defendants' counsel a proposed stipulation to dismiss the case, but *without prejudice*. (See, Hayes Decl., ¶ 5). For obvious reasons, Defendants are not willing to agree to a dismissal without prejudice that would allow Aliano to start over with a new case in this or another court, and thus informed Plaintiff's counsel on December 15, 2015 that Defendants would only stipulate to a dismissal *with prejudice*. (Id. at ¶ 6) To date, Plaintiff has not agreed to dismiss with prejudice, did not file the Court-ordered discovery plan, and has not filed a motion seeking dismissal. (Id. at ¶ 7).

Argument

I. Because Plaintiff Has Waived Class Certification Discovery, The Class Certification Motion Should Be Denied Without Further Delay

It is Plaintiff's burden, on a motion for class certification, to show that he has met each of the requirements of Rule 23. (See, e.g., Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013)). This Court has given Plaintiff several opportunities to identify discovery that would assist him in meeting this burden. (See, Docs. 31 and 46). Plaintiff has consistently failed to do so, and has now ignored the Court's deadline for submitting a proposed discovery plan. In light of Plaintiff's failure to identify any discovery that could assist him in establishing that class certification is warranted, and in view of the significant legal impediments to certification detailed in Defendants' class certification filings, the Court should hold that Plaintiff has failed to carry his burden and deny the class certification motion. Indeed, Plaintiff's failure to comply with a court order and to pursue discovery he previously claimed was essential is further evidence of his inadequacy to serve as class counsel.

The Court should not permit Aliano to avoid a ruling on class certification by dismissing his case without prejudice. The class certification issues are fully briefed and ripe for decision, and it is well within the Court's authority to deny Aliano's motion for class certification before ruling on any motion to dismiss that Aliano might file. Having expended significant time and money defending this dubious case, Defendants should not be faced with the expense of relitigating class certification in a subsequent case filed by Aliano.

Finally, Defendants reserve the right to oppose any attempt by Aliano to seek a dismissal without prejudice. Aliano has no right to dismiss without prejudice at this stage. (See, Fed. R. Civ. P. 41(a)(2)). Rather, any request by Aliano to dismiss would require court approval, including whatever "terms that the court considers proper." (Id.) Should Aliano now move for a dismissal without prejudice under Rule 41(a)(2), Defendants intend to oppose such motion and urge the Court to either deny the motion outright, or allow dismissal on one or more of the following terms:

(1) That the Court deny the pending motion for class certification prior to entering the dismissal;

(2) That the dismissal be with prejudice;

(3) That if the dismissal is allowed without prejudice, Aliano be precluded from filing a new action against Defendants which seeks class action treatment (i.e., be limited to filing an individual action only); and/or

(4) That if the dismissal is allowed without prejudice, Aliano shall reimburse Defendants for their attorneys' fees in this case should Aliano subsequently file a new case against Defendants.

The above terms have been imposed by various courts under Rule 41(a)(2), and would be appropriate here. Should Aliano move under Rule 41(a)(2) for dismissal without prejudice, Defendants will provide the applicable Rule 41 case law in their brief in opposition to Plaintiff's motion.

II. Alternatively, Defendants Should Be Permitted To Take Expedited Discovery From Aliano, Including Into The Circumstances Of The Destruction Of His Computer

As Defendants have argued, class certification fails on numerous legal grounds. And even if certification were legally possible, Plaintiff has now failed to seek any discovery to help him carry his burden. Class certification must be denied for these reasons alone. However, should this Court prefer that its certification ruling be further supported by an evidentiary record concerning Aliano's inadequacy to serve as a class representative – particularly in light of the suspicious circumstances under which his computer has not been maintained for forensic examination – Defendants request permission to pursue such discovery, and would be prepared to do so on an expedited basis. (See, Defendants' proposed discovery requests attached to Doc. 42 as Exhibits 1 and 2). As Plaintiff has forfeited seeking any certification discovery, this discovery directed to Aliano would be the only discovery taken before the Court rules on the certification motion.

Conclusion

For the foregoing reasons, Defendants request that Plaintiff's motion for class certification be denied or, alternatively, that expedited discovery directed to Aliano be taken to supplement the existing class certification record.

Dated: January 6, 2016

WHISTLEPIG, LLC and
GOAMERICAGO BEVERAGES, LLC

By: /s/Michael D. Hayes
One of Defendants' Attorneys

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CERTIFICATE OF SERVICE

Michael D. Hayes, an attorney, hereby certifies that a true and correct copy of the foregoing, **Defendants' Response Concerning Plaintiff's Failure to File Court-Ordered Discovery Plan**, was on January 6, 2016 electronically served on all counsel of record as a result of the CM/ECF filing of this document.

/s/Michael D. Hayes